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SUPREME COURT OF THE STATE OF WASHINGTON

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WILLIAM A. GRANGER,

*Respondent,*

v.

DEPARTMENT OF LABOR & INDUSTRIES,

*Petitioner.*

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**GRANGER'S ANSWER TO DEPARTMENT'S  
PETITION FOR REVIEW**

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ORIGINAL

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**A. *Granger* should stand as decided**

The Department's arguments that the Court of Appeals reached the wrong result, by wrong reasoning, which will poison future cases, are unsound, and speculative. *Granger* is the third recent decision – both before and after *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 120 P.3d 564 (2005) – in which different divisions of the Court of Appeals read the statute in essentially the same way and reached consistent results.<sup>1</sup> *Granger* is sound. Review should be denied.

**B. The Department misframes the issue before the court, and misdirects analysis of its petition**

The Department's assertion that when Mr. Granger was injured he did not have health care "coverage"<sup>2</sup> – by which the Department means that if he had submitted a claim to his health care trust the trust would not have paid it – and therefore that the money the employer was paying into the trust at the time of injury was not "wages," misframes the issue that was before the Court of Appeals, and misdirects analysis of the petition for

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<sup>1</sup> The other cases are *Department of Labor & Indus. v. Fahlgren*, 2005 Wash. App. LEXIS 2436 (September 20, 2005) (Div. III), and *Department of Labor & Indus. v. Bogle*, 2005 Wash. App. LEXIS 1888 (July 28, 2005) (Div. III).

<sup>2</sup> Petition at p. 2.

review. The collective bargaining agreement that governed Mr. Granger's employment required his employer to pay him hourly wages, some of which the employer deposited to a trust for what amounted to health insurance. The trust accumulated those "hours" in Mr. Granger's "hour bank." At the end of each month, if his account balance was at least 120 hours, he had "coverage" for the next month.<sup>3</sup> If he had those hours he had coverage even if he was not working. Conversely, he had no coverage for the month even if he started the month with a balance of 119 hours and reached 120 hours the first hour worked. In other words, his health care plan based coverage on *past* wages, not wages *at the time of injury*.

Accordingly, the theme of the Department's petition, permeating nearly every argument – that *coverage* should determine "wages" – is unsound.

The plain language of the "wage" statute, RCW 51.08.178, addresses *current* earnings: "For the purposes of this title, the monthly wages the worker was receiving from all employment *at the time of injury* shall be the basis upon which compensation is computed[.]" (Emphasis added.)

*See also Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1994), 915 P.2d P.2d 519 (1995) ("the purpose of workers'

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<sup>3</sup> The "Stipulation Of The Parties," in the Appendix, explains the "hour bank" and "coverage."

compensation benefits is to reflect future earning capacity rather than wages earned in past employment”). This court has long held to the idea that the wage statute concerns *earning capacity*.<sup>4</sup> Based on the earning capacity principle, this court said, in *Gallo v. Dep’t of Labor & Indus.*, 155 Wn.2d at 491, that workers “receive” benefits *when their employers pay money into a benefits trust*. Consistent with this, *Granger* said of *Gallo*:

In *Gallo v. Department of Labor & Industries*, our Supreme Court held that the “receiving...at the time of injury” limitation under RCW 51.08.178 asks “whether the employer was providing consideration of like nature at the time of the injury.”

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<sup>4</sup> Most recently, in *Gallo*, 155 Wn.2d at 481. See also *Cockle*, 142 Wn.2d at 811; *Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 287, 996 P.2d 593 (2000); *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 41, 992 P.2d 1002 (2000); *Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727 (1997); *Leeper v. Dep’t of Labor & Indus.*, 123 Wn.2d at 814 (“the purpose of workers compensation, *and the principle which animates it*, is to insure against the loss of earning capacity,” emphasis original).

See also *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (“The ‘plain meaning’ rule includes not only the ordinary meaning of the words, but the underlying legislative purpose and closely related statutes to determine the proper meaning of the statute”). A statute closely related to RCW 51.08.178 – RCW 51.32.090, the statute that mandates payment of temporary total disability benefits, based on the injured worker’s §178 “monthly wages” – mirrors that intent by providing that TTD be paid on wages an injured worker was “earning” at the time of injury:

Should a worker suffer a temporary total disability and should his or her employer at the time of injury continue to pay him or her the wages he or she was *earning* at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his order her employer shall so pay such wages.

RCW 51.32.090(6) (emphasis added.)

Slip op. at 6 (footnote omitted).<sup>5</sup> Mr. Granger's employer was providing the disputed consideration – the \$2.15 an hour, to Mr. Granger's "hour bank" – at the time of injury, for every hour Mr. Granger worked, *irrespective* of whether Mr. Granger had "coverage." Each hour paid into the trust contributed to coverage for the next month. By the plain language of the statute; by this court's analysis; and practically and realistically,<sup>6</sup> Mr. Granger was receiving the \$2.15 an hour at the time of injury.<sup>7</sup>

**C. Answer to Department's "Statement Of The Case"**

Mr. Granger has no new comment on this part of the Department's petition.

**D. Answer to Department's "Relevant RCW And WAC Text"**

The Court of Appeals correctly determined that "[b]ecause *Cockle*

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<sup>5</sup> See also *Cockle*, 142 Wn.2d at 820-21 (holding that the value of employer-provided health insurance is the amount the employer paid for it).

<sup>6</sup> *Adams v. Dep't of Labor & Industries*, 74 Wn. App. 626, 629, 875 P.2d 8 (1994), *affirmed*, 128 Wn.2d 224, 905 P.2d 1220 (1995) (citing *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 198, 120 P.2d 1003 (1942)).

<sup>7</sup> Immediately after the clause "At the time of injury, Mr. Granger was not eligible for health care coverage," the Department states that he "would not have become eligible for health coverage unless he continued to work in the near future on a relatively continuous basis." This is unnecessarily vague. Stipulated facts establish that Mr. Granger had 64 hours in his hour bank on the injury date. Since 120 hours triggers coverage, he had to work seven more days for coverage to resume.

and *Gallo* dictate that health care payments made by an employer at the time of a worker's injury must be included in the calculation of the worker's monthly wages for purposes of RCW 51.08.178, WAC 296-14-526 is not controlling.”<sup>8</sup> See *Cockle*, 142 Wn.2d at 811-812, rejecting Department regulations which at that time defined “wages” to exclude health care benefits altogether. Further, the regulation does not apply to this case because it did not exist when Mr. Granger’s rights became fixed, and it cannot apply retroactively. (See the next part of this Answer.)

**E. Answer to Department’s “Standard Of Review and Construction Rules”**

The Department’s argument that its own regulations “are entitled to great deference, and the courts ‘must accord substantial weight to the Department’s interpretation of the law,’” citing a Court of Appeals case, are refuted by this court’s analysis in *Cockle* – which concerned the same statute at issue here, and where the Department, as here, claimed its own regulations should determine the outcome of the case. See *Cockle*, 142

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<sup>8</sup> *Granger* slip op. at 8. In *In re Fred L. Jones*, BIIA Dec. 02 11439 (2003) (emphasis added), the Board determined that the Department’s wage regulations lacked force of law. (In Board practice, “Dckt. No.” indicates an ordinary decision, while “BIIA Dec.” indicates a “significant decision,” meaning a leading case. See RCW 51.52.160, and WAC 263-12-195. For the court’s convenience, “Dckt.” is indicated as “BIIA Dckt.”)

Wn.2d at 811-12:

The Department, however, contends that we should defer to its interpretation of RCW 51.08.178, since it is the agency charged with administering Title 51 RCW. Especially so, the Department asserts, since it has long excluded employer-provided benefits such as health care coverage from its computation of workers' compensation, and yet the Legislature has left unaltered the phrase "board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire in RCW 51.08.178.

While we may defer to an agency's interpretation when that will help the court achieve a proper understanding of the statute, such interpretation is not binding on us. Indeed, we have deemed such deference "inappropriate" when the agency's interpretation conflicts with a statutory mandate. Both history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is and to determine the purpose and meaning of statutes[.] ... Here, the Department's construction of RCW 51.08.178(1) gives little, if any, meaning to the statutory requirement that the "reasonable value" of all "other consideration of like nature" be included in the calculation of an injured worker's "wages." Such a construction cannot be reconciled with the Legislature's *statutory* mandate that all Title 51 RCW provisions "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. We therefore reject the Department's construction of RCW 51.08.178(1).

(Citations and internal punctuation omitted; underline added; italics added.)

Further, the Department's demand for deference conflicts with its argument that the meaning of "wages," in RCW 51.08.178, is plain; courts

“accord no deference to an agency's rule where no ambiguity exists.”

*Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004).

Finally, the wage regulations cannot apply to this case because they did not exist on Mr. Granger's injury date, when his statutory rights became fixed. Mr. Granger was injured in 1995. WAC Chapter 296-14-520 through 528 was adopted in 2003. Workers' compensation rights are governed by the law in effect on the injury date. *See Seattle School Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 358, 804 P.2d 621 (1991) (noting “the well established rule under the Industrial Insurance Act which fixes rights and liabilities on the date of the industrial injury,” and stating that “It has long<sup>9</sup> been the rule that the rights of parties under the workers' compensation statute governed by the law in force at the time the injury occurred,” citations omitted, emphasis added.<sup>10</sup>) The regulations cannot apply retroactively.<sup>11</sup>

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<sup>9</sup> At least as far back as 1931, in *Foster v. Dep't of Labor & Indus.*, 161 Wash. 54, 148-49, 296 P.2d 148 (1931) (citations to foreign cases, omitted).

<sup>10</sup> *See also Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 921, 91 P.3d 903 (2004), *review denied*, 153 Wn.2d 1015, 111 P.3d 1190 (2005), and citations therein.

<sup>11</sup> *See State v. MacKenzie*, 114 Wn. App. 687, 699-700, 60 P.3d 607 (2002) (a regulation may apply retroactively only if it was enacted to clarify internal inconsistency in the pertinent statute, and affects only procedure, not any substantive right).

**F. Answer to Department’s “Argument”**

**1. Factors governing review: RAP 13(4), and Philadelphia II v. Gregoire**

RAP 13.4(b) authorizes review if a Court of Appeals decision conflicts with another appellate decision, raises a constitutional issue, or “involves an issue of substantial public interest that should be determined by the Supreme Court.” The Department argues public interest, only. The factors that govern whether a petition involves an issue is one of substantial public interest that this court should review are (1) whether the issue is of public or private nature, (2) whether an authoritative determination is desirable to provide future guidance to public officers, and (3) whether the issue is likely to recur.<sup>12</sup> Here the issue is of a public nature, because it involves interpretation of the Industrial Insurance Act.<sup>13</sup> Whether the issue is likely to recur in the same legal context as this case – *i.e.*, before the Department’s wage regulations were adopted – seems

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<sup>12</sup> *Paxton v. City of Bellingham*, 129 Wn. App. 439, 444, 119 P.3d 373 (2005) (citing *Philadelphia II v. Gregoire*, 127 Wn.2d 707, 712, 911 P.3d 389 (1996)).

<sup>13</sup> See RCW 51.04.010 (purpose of the Industrial Insurance Act is to provide benefits to injured workers), and RCW 51.12.010 (Act intends to minimize injured workers’ suffering and economic loss). See also *Duskin v. Carlson*, 136 Wn.2d 550, 557-58, 965 P.2d 611 (1998) (the Industrial Insurance Act is a plan of social insurance, citations omitted), and *Cockle*, 142 Wn.2d at 811 (Act intends to remediate injured workers’ suffering and economic loss).

*unlikely*. The Department's arguments that relate to need for authoritative and definitive guidance are weak. *Granger* is authoritative as it stands, and provides clear guidance for similar cases. It is consistent with the unpublished decisions in Division Three. The Department's speculation about problems that might arise on facts different from the facts in this case do not support review. Accordingly, while *Granger* involves an issue of substantial public interest, the decision is not one that the Supreme Court should review.

Nearly all of the Department's petition simply reargues the merits of the issue before the Court of Appeals. In *every* case the Court of Appeals decides, at least one party contended for a different result; the fact that a losing party can articulate an argument that the court should have decided the case differently does not warrant review. Most of the rest of this Answer addresses the Department's argument on the merits, which seems to serially reiterate its theme that "wages" should be defined by health plan coverage based on past wages, instead of on wages Mr. Granger's employer was paying him at the time of injury.

**2. Granger applied RCW 51.08.178 correctly**

The Department's argument that "Division One failed to recognize

that ‘receiving at the time of injury’ is unambiguous”<sup>14</sup> is unsound. By focusing on what Mr. Granger’s employer was providing to him at the time of injury, the Court of Appeals applied the statute’s plain language. By arguing that “wages” should depend on what the *plan* provided or withheld, based on *past* wages, it is the *Department* that ignores the statute’s plain language.

The Department acknowledges that “wages, for purpose [sic] of RCW 51, are based exclusively on the measure of the worker’s lost earning capacity,”<sup>15</sup> but then argues – groundlessly – that “[b]y definition then, monthly wages cannot include wages that the worker never had and, consequently, never lost.”<sup>16</sup> Mr. Granger *did* have the accumulated “hours” his employer had paid into his “hour bank.” When, because of his industrial injury, he stopped working, his employer stopped paying him wages, including the \$2.15 an hour to his “hour bank.” He lost all the wages the employer stopped paying, including the \$2.15 an hour.

In arguing that “[c]onsideration that only *might* be received at

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<sup>14</sup> Petition at p. 9.

<sup>15</sup> Petition at p. 10.

<sup>16</sup> *Id.*

some unknown time in the future, depending on certain contingencies, is not within the scope of RCW 51.08.178,”<sup>17</sup> the Department again seeks to change the meaning of “wages” from earning capacity to “coverage.” (Incidentally, the Department’s argument looks much like its argument in *Cockle* for excluding health-care benefit from “wages” altogether: that in receiving the health insurance Ms. Cockle received nothing, because she might never have a covered claim.) The \$2.15 Mr. Granger earned, and his employer paid into the health care plan for each hour he worked was present, actual, “consideration.” The Department points out that “[t]he indisputable legislative policy choice is to take a snapshot of what is actually being received at the time of injury.”<sup>18</sup> Mr. Granger was actually receiving the \$2.15 an hour at the time of injury.

**3. The Department’s argument that the Board of Industrial Insurance Appeals decided the case incorrectly should have no bearing on whether to grant review**

Obviously the Board knew of its own prior decisions when it

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<sup>17</sup> Petition at 11 (emphasis original).

<sup>18</sup> *Id.*

decided this case in Mr. Granger's favor.<sup>19</sup>

The Department's argument of *In re Douglas A. Jackson*, BIIA Dec., 99 21831 (2001) and *In re Chester Brown*, BIIA Dec., 88 1236 (1989)<sup>20</sup> is not pertinent. Those cases rejected claims that "wages" "at the time of injury" should be based on anticipated future earnings that differed from the claimants' wages at the time of injury. Here the Court of Appeals addressed Mr. Granger's actual hourly wage at the time of injury. It is the *Department* that is arguing about future contingencies.

**4. The Department's argument that *Granger* included "anticipated future benefits" in "wages" is not accurate**

The Department's assertion that the Court of Appeals "concluded" that "*Gallo*...require[s] that a mere anticipated receipt of health care benefits in the future, as here, be included in wage computation,"<sup>21</sup> is simply not true. That court said nothing of the kind. This is the first sentence of the court's discussion of *Gallo*:

In *Gallo v. Department of Labor & Industries*, our Supreme

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<sup>19</sup> Moreover, as the Department acknowledged in its petition at p. 11 n.3, Board decision are not authoritative in courts.

<sup>20</sup> Petition at pp. 11-13.

<sup>21</sup> Petition at p. 13.

Court held that the “receiving...at the time of injury” limitation under RCW 51.08.178 asks “whether the employer was providing consideration of like nature at the time of the injury.”

Slip op. at 6 (footnote omitted). Then the court observed:

The Department argued in *Gallo*, as it does here, that “receiving at the time of injury” means that the worker must be able to claim the benefit at the time of injury. Our Supreme Court rejected this assertion, and clarified that a worker receives wages when the employer provides consideration.

*Id.* at 6-7 (footnote omitted). The court’s observation was accurate:

As the workers correctly note, the question is whether the employer was providing consideration of like nature at the time of the injury. Clearly, the workers were “receiving” the retirement benefit at the time of the injury because the employer was making payments into the retirement trust. ...

*Gallo*, 155 Wn.2d at 491. In four pages of analysis of the “wage” issue in *Granger*, five sentences (including the three just quoted) comprise the sum total of the court’s discussion of *Gallo*. The Court of Appeals stated its holding as follows:

**Because the \$2.15 an hour for health care coverage was a benefit that Granger was receiving at the time of his injury, which is critical to his health and survival, we affirm.**

Slip op. at 1-2 (emphasis added). The Court of Appeals analyzed and decided the “wage” issue in terms of what Mr. Granger was receiving at the time of injury – not future or anticipated benefits.

The Department implies that the statement, in *Gallo*, that

“[c]learly, the workers were ‘receiving’ the retirement benefit at the time of the injury because the employer was making payments into the retirement trust,” should apply to retirement plans only, *i.e.*, not to health care insurance or insurance-like plans.<sup>22</sup> The Department never really articulates the argument, and never explains why the *Gallo* statement should be so limited. The closest the Department comes is its statement that “[t]he *Gallo* court did not suggest that an employer’s making of contributions can change eligibility requirements,”<sup>23</sup> followed by repetition of its earlier argument that “[w]orkers who are not eligible for health care coverage when a contribution is made are not receiving consideration; they are receiving only a mere contingency that may never be of any value to them unless they continue to be employed in the near term such that their ‘hour bank’ will build up to a point of eligibility.”<sup>24</sup> The *Granger* decision that money being paid and banked at the time of injury to secure coverage is “wages,” whether or not a claimant then has “coverage” based on *past* wages, is consistent with the purpose of the Act – to minimize injured

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<sup>22</sup> Petition at p. 14.

<sup>23</sup> *Id.*

<sup>24</sup> Petition at pp. 14-15.

workers' suffering and economic loss<sup>25</sup> – and this court's precedents.

The Department's argument that *Granger* "treat[s] CBA 'hour-bank'-based health plans as if all workers have health coverage all of the time"<sup>26</sup> has nothing to do with whether *Granger* applied the law correctly.

Next the Department argues that "[l]ogically, if hourly contributions [to health care trusts] are the providing of health coverage when the hours *come out* of the 'hour bank,' the contributions cannot – as Division One held here – also be the providing of health coverage when the contributions *go into* the 'hour bank.'" That is speculation, because when Mr. Granger was injured and stopped working, his employer stopped paying him wages.<sup>27</sup> If the Department's argument had currency, the problem would lie with *Gallo*, and moreover, a part of *Gallo* not involved

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<sup>25</sup> RCW 51.12.010, and *Cockle*, 142 Wn.2d at 811.

<sup>26</sup> Petition at p. 15.

<sup>27</sup> See *Cockle*, 142 Wn.2d at 814:

The Department warns against including the value of employer-provided health care coverage in 'wages,' lest double recovery occur where such coverage is continued during the disability period. However, as the Court of Appeals noted:

The facts here do not require that we address this argument, for the library did not continue Cockle's insurance during the period of her disability. ...

in *Granger*. Finally, under *Granger* the money is not counted as “wages” twice. The Department’s argument completely breaks the connection between wages and work, *i.e.*, that wages are compensation for work.

The Department’s argument that “[i]t is also anomalous that under Division One’s ruling here that only those workers who have larger accruals in their hour banks at the time of injury – and hence will have health benefits coverage during injury-caused disability periods,” is immaterial to the facts in this case, and has nothing to do with whether *Granger* applied the law correctly.

The Department’s assertions that “because a worker can accumulate only 1080 hours in the health benefits hour bank,”<sup>28</sup> “[w]here a worker is at the cap, the employer does not make any [more] contributions,”<sup>29</sup> and [i]f a worker is injured at a point when the worker is at the cap, there will be no contribution”<sup>30</sup> are fiction: nothing in the parties’ stipulation – the entire factual record in the case – discloses *any* circumstance that would excuse Mr. Granger’s employer from paying the

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<sup>28</sup> *Id.* at p. 16.

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> *Id.* (emphasis added).

\$2.15 into his “hour bank” for each and every hour he worked.

**5. The Department’s claim that WAC 296-14-526 “gives effect to the plain terms of RCW 51.08.178” is unsound**

The Department’s claim that WAC 296-14-526 “gives effect to the plain terms of RCW 51.08.178”<sup>31</sup> is unsound, for reasons discussed above.

The Department’s argument that understanding of “wages” under the Industrial Insurance Act should be informed by a regulation that has nothing to do with the Act, because the regulation arguably treats public employees consistently with WAC 296-14-526,<sup>32</sup> makes no sense.

Further, (1) the argument is new to the case; (2) the argument reaches policy questions that are more appropriately legislative than judicial; and (3) that the law might treat certain employees differently than others has no intrinsic bearing on interpretation of §178 “wages.” *See Gallo*, 155 Wn.2d at 489-90, where the court rejected concern that on so-called “prevailing wage” jobs, union workers and nonunion workers with the same *actual* wage would have different “wages” under §178.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

**6. The Department's argument "WAC 296-14-526 applies RCW 51.08.178's 'receiving at the time of injury' requirement to help achieve the 'sure and certain' relief goal of RCW 51.04.010" is not accurate, and does not support granting review**

The Department's argument that *Granger* impedes "sure and certain relief" reprises the Department's argument in *Cockle*, opposing recognition of health care insurance as "wages" at all, which this court rejected. *See Cockle*, 142 Wn.2d at 820. The Board observed, in

*Granger*:

Though not mentioned in the Proposed Decision and Order, the interpretive WAC 296-14-526 states that a worker must be able to receive a union health care benefit in order to include the premium payment as part of wages, nevertheless, we are not bound by that interpretation and believe that *Cockle* dictates that the focus should be on the employer payment for the health care benefit, not the conditions of realization of the coverage. If we tread the latter path in considering employer contributions to health care, we could end up trying to determine the "wage base" effect of waiting periods, deductibles, exclusions, and a myriad of conditions placed on actual receipt of benefits.

In re William A. Granger, Dckt. No. 02 17611 (January 14, 2004).

*Granger* does not impede sure and certain relief.

**7. The Department's argument that "[w]here there is no loss of wages or benefits due to injury, there can be no wage loss replacement under RCW 51" has no bearing on this case**

The Department's argument that "[w]here there is no loss of wages or benefit due to injury, there can be no wage loss replacement under RCW 51"<sup>33</sup> is a non issue, as there is no question of wage replacement in this case.

Further, the argument is yet another mutation of the Department's equation of "wages" with "coverage." Where, as here, coverage depends on banked hours, the Department's argument that an injured worker who loses hours instead of having those hours banked loses nothing, is nonsense. So is the Department's similar argument that "[t]he payments made by his employer into the CBA trust fund at the time of his injury had no actual or practical value to him,"<sup>34</sup> where "coverage" depended on banked wages. (The Department's assertion that "[i]f he went to see a doctor in April of 1995, he [would have] had to pay for the visit himself"<sup>35</sup>

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<sup>33</sup> *Id.* at p. 18.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

is true, but irrelevant, where absence of coverage expressed accumulation of *past* wages, not wages being paid and received at the time of injury.)

*South Bend Sch. Dist. 118 v. White*, 106 Wn. App. 309, 23 P.3d 546 (2001), cited and argued by the Department,<sup>36</sup> has no bearing on this case.

The Department's overcompensation complaint<sup>37</sup> argues nothing more than that workers' compensation benefits cost money. This has no relevance to whether this case presents an issue of substantial public importance that this court should decide.

#### **G. Request for Attorney Fee and Costs**

If the court denies the Department's petition, Mr. Granger requests attorney fee and costs pursuant to RAP 18.1(a) and RCW 51.52.130.

#### **H. Conclusion**

*Granger* is soundly reasoned, and provides clear guidance to lower courts. The Department's petition for review should be denied.

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<sup>36</sup> Petition at p. 19.

<sup>37</sup> *Id.* At p. 20.

DATED this 12 day of January 2006.

Respectfully submitted,

RUMBAUGH, RIDEOUT, BARNETT & ADKINS

  
Terry J. Barnett, WSB 8080, Attorneys for  
Respondent William A. Granger

**CERTIFICATE OF SERVICE**

Under penalty of perjury under the laws of the State of  
Washington, I certify that on this date I mailed a copy of this pleading as  
follows:

John Wasberg, AAG  
Office of the Attorney General  
900 4<sup>th</sup> Ave., Suite 2000  
Seattle, WA 98164-1012

DATED this 12 day of January 2006.

  
Michelle E. Rhodes, Legal Assistant



**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND	)	
INDUSTRIES OF THE STATE OF	)	DIVISION ONE
WASHINGTON,	)	
	)	No. 55160-4-1
Appellant,	)	
	)	
vs.	)	<b>UNPUBLISHED OPINION</b>
	)	
WILLIAM A. GRANGER,	)	
	)	FILED: October 31, 2005
Respondent.	)	
_____	)	

**BAKER, J.** — For each hour that William Granger worked, his employer paid \$2.15 into a union trust fund that provided health care benefits for qualifying employees. But under the collective bargaining agreement which governed his employment, Granger did not have enough hours to qualify for health care benefits at the time of his injury. The Department of Labor and Industries allowed Granger's claim for time-loss compensation, but did not include the \$2.15 per hour in the calculation of his "monthly wage." The Board of Industrial Insurance Appeals reversed the Department, ordering that the \$2.15 per hour be included in the calculation. The superior court affirmed the Board, and the Department appeals. Because the \$2.15 per hour for health care coverage was a

benefit that Granger was receiving at the time of his injury, which is critical to his health and survival, we affirm.

I.

Granger filed an application for benefits with the Department of Labor and Industries after he sustained an industrial injury on April 20, 1995 while working for G.G. Richardson, Inc. The Department issued an order allowing the claim and awarding time-loss benefit compensation. In July 2004, the Department issued an order affirming an earlier order that set Granger's monthly wages at \$2,847.68 for purposes of calculating his time-loss compensation. The Department did not calculate health care benefits into Granger's monthly wages.

At the time of injury, Granger was a member of Union Local 292 of Washington and Northern Idaho District Counsel of Laborers. According to the Northwest Laborers-Employer's Health and Security Trust Fund, eligibility for medical benefits was determined on the basis of an hour bank system. For every hour that Granger worked, G.G. Richardson paid \$2.15 per hour into the union trust fund for health care coverage. After working a minimum of 200 hours, Granger became eligible for medical benefits. The employer deducted 120 hours from his bank each month for medical coverage, and Granger could claim medical benefits so long as his hour bank did not drop below 120 hours.

Although Granger had previously become eligible for medical benefits, he did not have enough hours in his "hour bank" on the date of his injury for him to qualify for health care coverage. Granger's eligibility would have been reinstated once his hour bank was rebuilt to 120 hours, so long as that occurred within 10

months. Otherwise, Granger would have forfeited his hours in the hour bank, and his medical coverage would have been reinstated only after he worked the minimum 200 hours for new employees.

Granger appealed the Department's order to the Board of Industrial Insurance Appeals, arguing that the value of the employer-paid contribution for health and welfare benefits of \$2.15 per hour should be included in the formula used to calculate his wages at the time of injury, and the resulting time-loss benefits. The parties submitted the case for decision based on stipulated facts. While the Industrial Appeals Judge affirmed the Department's order, on appeal, the Board reversed the appeal judge's decision. The Board remanded the claim, ordering the Department to recalculate Granger's monthly wages and include the employer-paid contribution to Granger's union health care benefit.

The Department appealed the Board's decision and order. The superior court affirmed the Board's decision after a bench trial. The Department appeals the superior court's judgment. We heard oral argument on July 11, 2005, but stayed our decision pending Gallo v. Department of Labor and Industries.<sup>1</sup>

## II.

An appeal to this court from a superior court review of a Board decision "is governed by RCW 51.52.140, which provides that 'the practice in civil cases shall apply to appeals prescribed in this chapter.'"<sup>2</sup> We must interpret RCW

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<sup>1</sup> No. 74849-7, 2005 Wash. LEXIS 797 (September 29, 2005).

<sup>2</sup> Kingery v. Dep't of Labor & Indus., 80 Wn. App. 704, 708, 910 P.2d 1325 (1996) (quoting RCW 51.52.140), aff'd, 132 Wn.2d 162, 937 P.2d 565 (1997).

51.08.178. Statutory construction is a question of law, which we review de novo.<sup>3</sup>

This appeal turns on the meaning of "receiving . . . at the time of injury" for purposes of RCW 51.08.178. The Department argues that the trial court erred because Granger was not eligible to claim health care benefits at the time of his injury, and therefore was not "receiving" the benefit of the employer's contributions. In response, Granger argues that the term "receiving" refers to whether his employer was paying consideration at the time of injury, not whether he was eligible to claim the benefit.

Compensation rates for time-loss and loss of earning power are determined "by reference to a worker's 'wages,' as that term is defined in RCW 51.08.178, at the time of the injury."<sup>4</sup> Monthly wages include both cash wages and other consideration paid by the employer that is critical to protecting the worker's basic health and survival.<sup>5</sup>

In pertinent part, RCW 51.08.178 provides:

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned.

.....  
The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the

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<sup>3</sup> Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

<sup>4</sup> Cockle, 142 Wn.2d at 806.

<sup>5</sup> Cockle, 142 Wn.2d at 822.

employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section.<sup>[6]</sup>

In Cockle v. Department of Labor and Industries,<sup>7</sup> our Supreme Court considered whether the value of employer-provided health care coverage is “other consideration of like nature.”<sup>8</sup> Concluding that this phrase is ambiguous, the court engaged in statutory construction.<sup>9</sup> Because the statute is remedial in nature, the court liberally construed the statute, and resolved doubts in favor of the worker.<sup>10</sup> It explained that “Title 51 RCW’s overarching objective is ‘reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.’”<sup>11</sup> The court noted that wage calculation under the statute was changed by the 1971 Legislature to reflect a worker’s actual “lost earning capacity,”<sup>12</sup> and that “the workers’ compensation system should continue ‘serv[ing] the [Legislature’s] goal of swift and certain relief for injured workers.’”<sup>13</sup> The court then construed the phrase “board, housing, fuel, or other consideration of like nature”<sup>14</sup> to mean “readily identifiable and reasonably calculable in-kind components of a worker’s lost earning capacity at the time of

<sup>6</sup> RCW 51.08.178(1).

<sup>7</sup> 142 Wn.2d 801, 16 P.3d 583 (2001).

<sup>8</sup> Cockle, 142 Wn.2d at 805.

<sup>9</sup> Cockle, 142 Wn.2d at 821-22 (citing Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991)).

<sup>10</sup> Cockle, 142 Wn.2d at 819-20.

<sup>11</sup> Cockle, 142 Wn.2d at 822 (quoting RCW 51.12.010).

<sup>12</sup> Cockle, 142 Wn.2d at 822 (quoting Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 798, 947 P.2d 727 (1997)).

<sup>13</sup> Cockle, 142 Wn.2d at 822 (quoting Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

<sup>14</sup> RCW 51.08.178(1).

injury that are critical to protecting workers' basic health and survival."<sup>15</sup> The court further explained that "[c]ore, nonfringe benefits such as food, shelter, fuel, and health care all share that 'like nature.'"<sup>16</sup>

The circumstances we are presented with differ from those in Cockle because, unlike Granger, at the time of her injury, Cockle was eligible to claim health care benefits.<sup>17</sup> But this distinction is immaterial to our determination that Granger was receiving health care benefits at the time of injury.

In Gallo v. Department of Labor and Industries,<sup>18</sup> our Supreme Court clarified that the "receiving . . . at the time of injury" limitation under RCW 51.08.178 asks "whether the employer was providing consideration of like nature at the time of the injury."<sup>19</sup> In Gallo, the court decided whether consideration paid by employers for certain benefits, such as retirement plans, apprentice-programs, and life insurance, constituted "other consideration of like nature" under RCW 51.08.178(1). It analyzed each contribution under the test set forth in Cockle, explaining that not all contributions are critical to the basic health and survival of the worker, and concluded that the contributions in question did not constitute wages.<sup>20</sup>

The Department argued in Gallo, as it does here, that "receiving . . . at the time of injury" means that the worker must be able to claim the benefit at the time

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<sup>15</sup> Cockle, 142 Wn.2d at 822.

<sup>16</sup> Cockle, 142 Wn.2d at 822-23.

<sup>17</sup> Cockle, 142 Wn.2d at 805-06.

<sup>18</sup> No. 74849-7, 2005 Wash. LEXIS 797 (September 29, 2005).

<sup>19</sup> Gallo, 2005 Wash. LEXIS 797 at \*34.

<sup>20</sup> Gallo, 2005 Wash. LEXIS 797 at \*2.

of the injury. Our Supreme Court rejected this assertion, and clarified that a worker receives wages when the employer provides consideration.<sup>21</sup>

Because Granger's employer was paying \$2.15 per hour for his health care coverage, Granger was receiving that benefit at the time of injury. And Cockle makes clear that health insurance payments are "readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival," and therefore properly calculated into a worker's monthly wages under RCW 51.08.178.<sup>22</sup>

While rejecting the argument that retirement benefits are "other consideration of like nature" for purposes of wage calculation, the Gallo court explained that employer payments into retirement plans are not benefits critical to the basic health and survival of a worker at the time of injury because "they are not intended to be, nor are they generally immediately available to the worker at the time of injury."<sup>23</sup> Similarly, Granger's health benefits were not immediately available to him at the time of injury. But employer payments for health care coverage are distinguishable from retirement payments. Unlike retirement benefits, health care benefits are intended for the basic health and survival of the worker while employed. And, although Granger's health care coverage had temporarily lapsed, the employer was replenishing his bank with each hour he worked and Granger would have soon realized the benefit.

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<sup>21</sup> Gallo, 2005 Wash. LEXIS 797 at \*34.

<sup>22</sup> Cockle, 142 Wn.2d at 822.

<sup>23</sup> Gallo, 2005 Wash. LEXIS 797 at \*34.

The Department argues that WAC 296-14-526 directly addresses the question presented by Granger's case. Under WAC 296-14-526, the value of other consideration of like nature is included in the worker's monthly wages only where the worker was actually eligible to receive the benefit.<sup>24</sup> Although an appellate court defers to an "agency's interpretation when that will help the court achieve a proper understanding of the statute," such interpretations are not binding.<sup>25</sup> If the agency's interpretation conflicts with a statutory mandate, deference is inappropriate.<sup>26</sup> "[B]oth history and uncontradicted authority make clear that it is emphatically the province and duty of the judicial branch to say what the law is" and to "determine the purpose and meaning of statutes."<sup>27</sup>

Because Cockle and Gallo dictate that health care payments made by an employer at the time of a worker's injury must be included in the calculation of the worker's monthly wages for purposes of RCW 51.08.178, WAC 296-14-526 is not controlling.

Granger requests attorney fees under RCW 51.52.130, which provides:

If, on appeal to the superior or appellate court from the decision and order of the board . . . where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. . . . If . . . in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, . . . the attorney's fee fixed

<sup>24</sup> WAC 296-14-526(1)(b)(ii).

<sup>25</sup> Cockle, 142 Wn.2d at 812 (quoting Clark County Citizens United, Inc. v. Clark County Natural Res. Council, 94 Wn. App. 670, 677, 972 P.2d 941 (1999)).

<sup>26</sup> Cockle, 142 Wn.2d at 812 (citing Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 127, 814 P.2d 626 (1991)).

<sup>27</sup> Cockle, 142 Wn.2d 812 (quoting Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 555, 637 P.2d 652 (1981)).

by the court, for services before the court only, . . . shall be payable out of the administrative fund of the department.<sup>[28]</sup>

Because the Department appealed and Granger's right to relief is sustained, we award reasonable attorney fees for services before this court only.<sup>29</sup>

AFFIRMED.

Baker, J

WE CONCUR:

Appelwick, J

Grosse, J

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<sup>28</sup> RCW 51.52.130.

<sup>29</sup> Piper v. Dep't of Labor & Indus., 120 Wn. App. 886, 890, 86 P.3d 1231, rev.denied, 152 Wn.2d 1032 (2004).

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

In Re: William A. Granger, )  
 ) Docket No. 02-17611  
Claim No.: P031960 )  
 )  
 ) STIPULATION OF THE PARTIES

Comes Now the parties and hereby stipulate to the following facts.

1. This is an appeal of the Department order dated July 9, 2002 which calculates the claimant's time loss compensation rate by taking into account the following: the wage for the job of injury is based on \$16.18 per hour, 8 hours per day, 5 days per week, totaling \$2,847.68 per month, and a date of injury of April 20, 1995. The order does not provide for health care benefits. It calculates the worker's total gross wage as \$2,847.68 per month, marital status as single with no dependents, and establish a Social Security offset by order dated June 21, 1996.

2. The order of July 9, 2002 does not include any health care benefits.

3. William Granger has been a 31 year member of the Union Local 292 of Washington and Northern Idaho District Counsel of Laborers.

4. According to the Northwest Laborers-Employer's Health and Security Trust Fund, revised September 1999, eligibility for medical benefits is determined on the basis of an hour-bank system. It is agreed that William Granger had a minimum of 200 hours which was required for initial eligibility. Once the minimum eligibility requirement is established, 120 hours will be deducted from the employee's "bank" for each month of coverage. This will provide coverage beginning the first day of the second month following each month in which 120 hours was deducted. An employee will continue to be covered as long as there

STIPULATION OF PARTIES - 1

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**H W Z**  
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1 are 120 hours or more in the "bank". A maximum of nine consecutive months of  
2 prepaid continuous coverage (1,080 hours) can be accumulated.

3 5. When the hours in the "hour bank" drop below 120 they remain in the  
4 bank for ten months from the last date of eligibility (from hours worked or COBRA  
5 self payments) after which the "bank" is forfeited.

6 6. William Granger had coverage until March 31, 1995 when his  
7 coverage lapsed because he did not have enough hours worked. It is agreed that  
8 his coverage had lapsed as of the date of his injury, April 20, 1995.

9 7. According to the Union agreement, reinstatement of eligibility occurs  
10 if the "hour bank" shows a total of at least 120 hours within the ten calendar month  
11 period immediately following the termination of his eligibility. Such reinstatement  
12 will become effective on the first day of the second calendar month in which this  
13 requirement is met. If coverage is not reinstated within a ten calendar month  
14 period, any reserve hours in the "hour bank" will be forfeited. The worker will again  
15 become eligible for coverage upon completion of the initial eligibility requirement  
16 for new employees.

17 8. According to the Union contract, when a worker moves from one  
18 employer to another his protection may continue, even though he is unemployed  
19 between jobs, provided he has sufficient accumulated hours credited to him. The  
20 new employer has to contribute to the trust fund for the worker.

21 9. As of April 17, 1995, the claimant William Granger began work for  
22 G.G. Richardson at the Troutline Chelan job site beginning at 0700 hours April 17,  
23 1995.

24 10. On April 20, 1995 the claimant was injured while in the course of his  
25 employment. The Department accepts the claim for injury to the back, neck, arms  
26 and hip.

27 11. As of April 20, 1995, Bill Granger had 64 hours in the "hour bank".

28 12. If, as of April 20, 1995, Bill Granger had filed a claim for medical  
benefits for treatment, he would have been denied coverage as of April 20, 1995

STIPULATION OF PARTIES - 2

A-12

1 due to a lack of enough hours in the hours bank.

2 13. As a direct and proximate result of his industrial injury, the claimant  
3 has been unable to work since April 20, 1995.

4 14. William Granger's rate of pay was \$16.18 per hour. In accordance  
5 with the Union contract, the fringe benefit contributions included Health and  
6 Welfare of \$2.15 per hour, paid by employer.

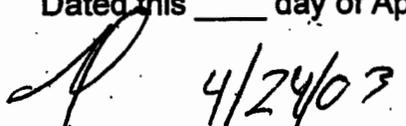
7 15. In accordance with the Union contract, the employer withheld funds  
8 out of the claimant's paycheck for health and welfare benefits, but does not  
9 actually pay the premium until the following month. In this particular case, the  
10 employer paid benefits based on the hours actually worked and paid into the fund  
11 for the hours actually worked by the claimant in April 1995.

12 16. The employer did contribute towards claimant's health insurance  
13 coverage, in the amount of \$136.32, for 64 hours the claimant worked in April  
14 1995.

15 17. As of May 1995, the health benefits contributed by the employer  
16 were terminated.

17 18. Bill Granger terminated coverage under the Northwest Laborers  
18 active plan on May 31, 1995. He became effective under the Retiree Medical Plan  
19 on June 1, 1996 and is current through May 31, 2003. His premiums are \$90 per  
20 month.

21 Dated this \_\_\_\_ day of April, 2003.

22  4/24/03  
23 GERRY R. ZMOLEK WSBA #13316  
24 Attorney for Claimant

25   
26 PATRICIA L. ALLEN WSBA #27109  
27 Assistant Attorney General

28 STIPULATION OF PARTIES - 3

A-13

**RCW 51.08.178****"Wages" -- Monthly wages as basis of compensation -- Computation thereof.**

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;
- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By twenty-six, if the worker was normally employed six days a week;
- (g) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.

[1988 c 161 § 12; 1980 c 14 § 5. Prior: 1977 ex.s. c 350 § 14; 1977 ex.s. c 323 § 6; 1971 ex.s. c 289 § 14.]

**NOTES:**

**Severability -- Effective date -- 1977 ex.s. c 323:** See notes following RCW 51.04.040.

**Effective dates -- Severability -- 1971 ex.s. c 289:** See RCW 51.98.060 and 51.98.070.

<http://search.leg.wa.gov/pub/textsearch/ViewHtml.asp?Action=Html&Item=1&X=112100...> 1/12/2006